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No. 91-610

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,

Petitioners,

v.

NICHOLAS DEMISAY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should *certiorari* be granted so that this Court may review whether the Court of Appeals correctly held that the petitioner multiemployer pension and welfare trust funds were structurally defective under section 302(c)(5) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c)(5), unless they transferred to the respondent multiemployer pension and welfare funds surplus reserves attributable to contributions made on behalf of respondent employees, because a significant number of those employees previously covered under petitioner trust funds transferred to coverage under respondent trust funds.

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I

COUNTERSTATEMENT OF THE CASE

Preliminary Statement

Respondents, the management trustees of the Local 144 Southern New York Residential Health Care Facilities Association Pension and Welfare Funds (collectively, the "Southern Funds"), the employers and management companies[1] that are members of the Southern New York Residential Health Care Facilities Association, Inc. (the "Southern Employers"), and individual employees of the Southern Employers ("Southern Employees") respectfully request that this Court deny the petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit. The reasons put forth by Petitioners to urge this Court to grant *certiorari* do not demonstrate "special and important reasons" for granting the writ, as required by Rule 10 of the Rules of the United States Supreme Court.

Counterstatement Of Facts

Petitioners, Local 144 Nursing Home Pension Fund ("Greater Pension Fund"), New York City Nursing Home - Local 144 Welfare Fund ("Greater Welfare Fund") and the individual trustees of the Greater Funds (collectively, the "Greater Funds"), make certain factual misstatements and omissions in the Statement of the Case presented in the Petition ("Pet.").

Until 1981 the Southern Employers were members of Greater New York Health Care Facilities Association, Inc., a multiemployer bargaining association (JA 13a, 135a, 160a).[2] The Southern

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1 Respondent corporations have no parent companies or partially-owned subsidiary companies. Sup. Ct. R. 29.1.

2 Citations are to the Joint Appendix ("JA") filed with the Court of Appeals.

Employers made contributions to the Greater Welfare Fund and the Greater Pension Fund on behalf of their employees for whom contributions were required to be made (id.). The majority of the Southern Employers had been making contributions to the Greater Funds for nearly fifteen years (JA 402a-403a, 408a, 436a-437a, 496a, 522a).

The Southern Employers withdrew from Greater New York in 1981 and became members of the Southern New York Residential Health Care Facilities Association, Inc., a nonprofit trade association (JA 13a, 160a). The Southern Employers continued to contribute to the Greater Funds (JA 13a-14a, 160a). In November 1984, following the expiration and termination of each Southern Employer's 1981 - 1984 collective bargaining agreement with Local 144, Hotel, Hospital, Nursing Home and Allied Services Employees Union, SEIU, AFL-CIO ("Local 144"), the Southern Employers executed new individual three-year collective bargaining agreements with Local 144, effective March 31, 1984 through March 31, 1987 (JA 14a, 162a). During negotiations leading to these agreements, the Southern Employers and Local 144 discussed the possibility of establishing new pension and welfare funds for the benefit of the Southern Employees (JA 14a, 161a-162a). The Southern Employers had become increasingly concerned that the Greater Funds were not administered fairly but instead, certain employers received, in effect, "special deals," and were not contributing the amounts they were obligated to contribute to the Greater Funds (JA 502a-503a, 511a). The Southern Employers, who employed approximately 1,981 employees covered by the Greater Funds (JA 18a), believed these special deals threatened the financial condition of the Greater Funds, consequently threatening the employees' expectations of welfare and pension benefits (JA 502a-503a, 511a).

Each of the collective bargaining agreements that the Southern Employers and Local 144 executed in November 1984 contained an identical provision that Local 144 and the Southern Employers would establish the Southern Funds and provide employees with the same level of benefits as provided by the Greater Funds as of April 1,

1984 (JA 41a). The Southern Employers negotiated on the basis that the Greater Funds would be obligated under section 302(c)(5) of the LMRA to transfer that portion of its reserves attributable to contributions made by the Southern Employers on behalf of the nearly 2,000 Southern Employees, who represented approximately 20% of the employees covered by the Greater Funds (JA 161a, 221a).

On December 1, 1985 the Southern Funds became operational, providing coverage to the nearly 2,000 employees of the Southern Employers (JA 18a, 165a). The Greater Funds and the Southern Funds are Taft-Hartley multiemployer trust funds established and maintained pursuant to section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5) (JA 18a, 134a-135a). The board of trustees of each of the Southern Funds are comprised of eight persons, four trustees designated by Local 144 as union-appointed trustees and four trustees appointed by the Southern Association as employer-appointed trustees (JA 84a, 117a). At all relevant times, the four union-appointed trustees of the Southern Funds were the same individuals who acted as the four union-appointed trustees of the Greater Funds (JA 127a, 129a, 135a).

At the time of the transfer of employees, the Greater Funds possessed reserves that were derived, in part, from contributions received from the Southern Employers on behalf of their participant employees and/or from the income therefrom (JA 156a-158a).[3]

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3 The Greater Funds claim, without any factual support in the record, that this "case does not raise issues regarding excess assets in benefit plans" because the Greater Welfare Fund "has been struggling to maintain health levels" and the Greater Pension Fund "provides a modest maximum pension." Pet. at 3. The current financial condition of the Greater Funds is irrelevant. The relevant inquiry is the financial condition of the Greater Funds at the time the Southern Employees were transferred to the Southern Funds. Further, the Greater Funds' allegations about the financial condition of the Greater Welfare Fund were not raised in the district court or the court of appeals and therefore, are not properly before this Court for review. *See Patrick v. Burget*, 486 U.S. 94, 99 n. 5 (1988).

These reserves have not and will not be used by the Greater Funds to provide benefits to the Southern Employees (id.).

II

REASONS THIS COURT SHOULD DENY THE PETITION FOR CERTIORARI

This case does not present "special and important reasons" necessary to justify granting a writ of *certiorari*. The Second Circuit's decision does not address an important, unsettled issue of federal law. Nor does the decision conflict with applicable decisions of the Supreme Court.

The decision of the Second Circuit also does not conflict with the decision of any other court of appeals. There is no other circuit court decision squarely on the issue decided by the Second Circuit. To the extent other circuit court decisions address the question of whether a trust fund is structurally defective under section 302(c)(5) of the LMRA, there is no circuit court decision which takes a position contrary to the position of the Second Circuit. The few cases from the Ninth and Seventh Circuit Courts cited by Petitioners are readily distinguishable on the facts and questions of law presented in those cases.

A. THIS CASE IS LIMITED IN EFFECT AND DOES NOT RAISE AN IMPORTANT ISSUE OF UNSETTLED FEDERAL LAW

The decision of the Court of Appeals in the instant case is limited to a specific factual situation that rarely has been the subject of litigation. The Court of Appeals addressed only the question of whether a multiemployer benefit plan with surplus assets is structurally defective under section 302(c)(5) of the LMRA because it did not transfer surplus assets to another multiemployer benefit plan when a significant number of employees transferred from coverage under the first plan to the second plan. The Second

Circuit's decision is reprinted at pages 1a-12a of the Appendix to the Petition ("Pet. App.").

In reaching its conclusion, the Second Circuit followed its 1984 decision in *Local 50, Bakery & Confectionary Workers Union v. Local 3, Bakery & Confectionary Workers Union*, 733 F.2d 229 (2d Cir. 1984). As in the instant case, *Local 50* involved a situation in which a significant number of employees, representing all of the employees of an employer, transferred from one pooled multiemployer benefit plan to another pooled multiemployer benefit plan. Contrary to Petitioners' melodramatic pronouncement that the Second Circuit's interpretation of section 302(c)(5) of the LRMA is a "cancer" that will "kill" multiemployer plans (Pet. at 11), there are only a few decisions that deal with this issue. Apart from *Local 50* and the case at bar, there is only one other court that has ordered a transfer of excess reserves between employee benefit plans under the LMRA. *See Operative Plasterers and Cement Masons Int'l Ass'n Local 202 v. Board of Trustees of the Plastering Industry Welfare and Pension Trust Funds*, 710 F. Supp. 42, 46 (E.D.N.Y.) (court ordered a local union to transfer pension and welfare benefit reserves contributed on behalf of the employees of another local union), *appeal dismissed*, 888 F.2d 1376 (2d Cir. 1989.

Federal courts already have rejected the argument that a transfer of reserves is required every time employees leave a multiemployer benefit plan. In *O'Hare v. General Marine Transport Corp.*, 740 F.2d 160, 173-74 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985), the Second Circuit distinguished its decision in *Local 50* and refused to order a transfer under section 302(c)(5) when only a few employees of an employer transferred to another plan. Citing to *O'Hare*, the Seventh Circuit also rejected a claim for a transfer of reserves under section 302(c)(5) of the LMRA. *Stinson v. Ironworkers Dist. Council of Southern Ohio and Vicinity Benefit Trust*, 869 F.2d 1014, 1021 (7th Cir. 1989).

The determination of whether a transfer of reserves between employee benefit plans is necessary to remedy a structural defect under section 302(c)(5) of the LMRA turns on the particular facts of

each case. The issue is limited to situations in which there is an excess of assets over liabilities in a multiemployer benefit plan that are attributable in part to contributions made on behalf of the transferred employees. It is limited further to benefit trust funds that are governed by the LMRA. It is appropriate for this Court to decline to review a decision when the decision is based on specific factual details that are not likely to be found in other cases. *Vasquez v. United States*, 454 U.S. 975, 977 (1981).

Petitioners attempt to create an important issue of unsettled federal law by mischaracterizing the holding of the Second Circuit and asserting that the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), 29 U.S.C. §§ 1001-1461 (1985), rather than the LMRA, governs the disposition of this case and would yield a different result. Pet. at 6-8.[4] The authority of federal courts to review employee benefit plans under section 302 of the LMRA is well-settled. In a case involving the interpretation of a welfare plan, this Court stated, "[i]t is, of course, clear that compliance with the specific standards of § 302(c)(5) in the administration of welfare funds is enforceable in federal district courts under § 302(e) of the LMRA." *United Mine Workers of Am. Health & Retirement Funds v. Robinson*, 455 U.S. 562, 573 n.12 (1982); *see also Arroyo v. United States*, 359 U.S. 419, 426-27 (1959).

Congress intended both the LMRA and ERISA to govern multiemployer benefit plans. In enacting ERISA, Congress stated expressly that the LMRA would continue to apply to employee benefit plans. "There are essentially three federal statutes which, although accomplishing different purposes and vested within different federal departments for enforcement, are all compatible in their regulatory responsibilities." S. Rep. No. 127, 93d Cong. 1st

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4 Petitioners characterize the court's holding, for example, as a mandate to pay assets to an employer in violation of ERISA. Pet. at 15. The Second Circuit's decision, however, authorizes only a reallocation of reserves among multiemployer benefit plans and therefore, does not constitute a payment of assets from a trust fund to an employer.

Sess. 4 (1973), *reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, at 590 (1976). One of these federal statutes is the LMRA.

There is nothing in the statutory language or legislative history of ERISA or the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") that supports the proposition that Congress intended to repeal section 302(c)(5) of the LMRA. Congressional intent to repeal a statute "'must be clear and manifest.'" *Morton v. Mancari*, 417 U.S. 535, 551 (1974) *(quoting United States v. Borden Co.*, 308 U.S. 188, 198 (1939)). Absent a clearly expressed intent to repeal, federal courts must give effect to two statutes on the same subject. *See, e.g., Mobile, Alabama-Pensacola, Florida Bldg. and Constr. Trades Council v. Daugherty*, 684 F. Supp. 270, 282 (S.D. Ala. 1988) (district court reconciles the terms of ERISA and the LMRA dealing with the tenure of trustees).

The Second Circuit's decision under the LMRA in the instant case is reconcilable with the provisions in ERISA dealing with transfers of assets and liabilities between multiemployer pension plans. Congress mandated a transfer of assets and liabilities between multiemployer pension plans in cases where there was a certified change in the collective bargaining representative. § 4235 of ERISA, 29 U.S.C. § 1415. Congress did *not* state, however, that this was the only time that a transfer was required. Further, Congress did not provide any specific guidelines in ERISA dealing with the transfer of assets and liabilities between welfare plans.

Petitioners also attempt to create an important issue of unsettled federal law by claiming that the Second Curcuit's interpretation of the language of section 302(c)(5) is unreasonable. Pet. at 8. Section 302(c)(5) of the LMRA provides that employer contributions made to a trust fund must be used

> "for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the

> employees of other employers making similar payments, and their families and dependents). . . ."

29 U.S.C § 186(c)(5). The Second Circuit found that, because all of the Southern Employees transferred out of the Greater Funds, the pooled monies held in reserve by the Greater Funds would not be used for the benefit of the Southern Employees "jointly with the employees of other employers." Pet. App. at 8a. Instead, the Greater Welfare Fund would use all of its pooled reserves to pay benefits to employees other than the Southern Employees. The Greater Pension Fund similarly would use its pooled reserves to pay pension benefits to employees of other employers, with the limited exception of certain pension benefits to Southern Employees vested in the Greater Pension Plan. Unless there was a transfer of an aliquot share of the surplus reserves to the Southern Funds, the Southern Employees would be deprived of the benefit of the contributions that had been made on their behalf to the Greater Funds in lieu of wages.

B. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT

The decision by the Court of Appeals in this case does not conflict with any decisions of this Court. Petitioners attempt to create a conflict by citing to this Court's reasoning in *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979), for the proposition that ERISA, rather than the LMRA, controls the issue in this case. The reasoning in *Daniel* is inapplicable to the case at bar.

In *Daniel*, the Supreme Court refused to extend the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 to allegations that a union and a pension fund trustee made certain misstatements and omissions relating to a noncontributory, compulsory pension plan. 439 U.S. at 570. This Court based its reasoning on the fact that there was no evidence that Congress ever thought the pension plans at issue were subject to federal regulation as securities. 439 U.S. at 563.

Unlike the Securities Acts in *Daniel*, Congress enacted section 302 of the LMRA specifically to regulate multiemployer trust funds. Section 302(c)(5) establishes certain statutory requirements, not found in ERISA, that must be met to permit employer contributions to multiemployer plans.

The decision of the Court of Appeals also does not conflict with the other Supreme Court decisions cited by petitioners. In *Robinson*, 455 U.S. 462, 571-72 (1982), this Court stated that, while federal courts have authority to examine employee benefit plans under the LMRA, federal courts cannot review for reasonableness the provisions of a collective bargaining agreement under section 302(c)(5) of the LMRA.[5] The Second Circuit's decision here does not interpret any provisions of a collective bargaining agreement. Pet. App. at 8a.

The decision of the Court of Appeals in the instant case also does not conflict with this Court's decisions in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) or *Arroyo v. United States*, 359 U.S. 419 (1959). In *Amax Coal*, this Court held that the employer-selected trustees of a Taft-Hartley trust fund are not representatives of the employer for the purposes of collective bargaining. 453 U.S. at 330. This Court reviewed the legislative history of section 302(c)(5), finding that it was intended to ensure that employee benefit trust funds are legitimate trust funds subject to the requirements of long-established fiduciary principles. Id. at 330-31. There is nothing in the decision of the Second Circuit in the case at bar which conflicts with the *Amax Coal* decision.

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5 Further, the Second Circuit's decision in the instant case does not conflict with this Court's observation in *Robinson* that the conditions set forth in section 302(c)(5) do not place restrictions on the allocation of the funds among the persons protected by section 302(c)(5). 455 U.S. at 572. This observation was made in the context of the Court's rejection of a claim that a provision in the collective bargaining agreement distinguishing between the benefits available to widows of pensioners and widows of pension-eligible mine workers had to meet a test of reasonableness under section 302(c)(5).

Similarly, the decision of the Court of Appeals does not conflict with this Court's decision in *Arroyo*, 359 U.S. 419 (1959). In *Arroyo*, this Court noted that Congress did not intend section 302(c)(5) to duplicate state criminal laws. Instead, Congress enacted section 302(c)(5) to establish "specific standards . . . to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established." 359 U.S. at 426. The decision of the Second Circuit furthers that congressional policy as stated by this Court by reallocating benefit reserves to the employees for whom the contributions were made in accordance with the statutory language of section 302(c)(5).

C. THE SECOND CIRCUIT'S DECISION DOES NOT CREATE A CONFLICT IN THE CIRCUIT COURTS OR VIOLATE ERISA

Petitioners claim that because the Second Circuit's decision "is effectively requiring a return of employer contributions," it creates a "clear conflict" in the circuits and violates ERISA. Pet. at 15. The Second Circuit's decision does not order a return of contributions to any Southern Employer but a transfer of a share of reserves between multiemployer benefit plans when a significant number of employees transfer from one set of multiemployer plans to another set of multiemployer plans. Petitioners do not cite to any cases that conflict with this holding. The absence of any conflict among the circuit courts makes the exercise of *certiorari* jurisdiction in the instant case inappropriate. *See Vasquez*, 454 U.S. at 976.

The Court of Appeals ordered "the Greater Funds [to] reallocate to the Southern Funds that portion of reserves which represent contributions on behalf of the Southern Employees." Pet. App. at 11a. The transfer of reserves between the multiemployer benefit plans is not a return of contributions to the Southern Employers. Although a transfer of reserves may benefit the Southern Employers indirectly because the financial condition of their employees' welfare and pension funds would be

strengthened, this indirect benefit is not a "return" of any contributions previously made by a Southern Employer to the Greater Funds.[6]

Petitioners cite to two private letters rulings issued by the Internal Revenue Service ("IRS") which they claim support their argument that the transfer of reserves here is a return of contributions to the Southern Employers. The IRS rulings are inapposite. In one ruling, the IRS considered whether the excess assets of a terminated defined benefit plan, which may revert to the employers, constitute taxable income if the assets were transferred immediately to a defined contribution plan. Priv. Ltr. Rul. 89-48-032 (Sept. 6, 1989). The IRS determined that because the excess assets would be taxable if reverted to the employers, the excess assets also are taxable if a defined benefit plan was terminated and assets transferred to a defined contribution plan. The Greater Funds are not terminating. Their excess assets cannot revert to contributing employers and would not be transferred to a defined contribution plan.

In the second IRS ruling cited by Petitioners, the IRS determined that an employer, which sponsored a defined benefit plan which it intended to terminate, could not satisfy its contractual obligations to a government agency through a distribution of the plan assets. Priv. Ltr. Rul. 91-36-017 (June 10, 1991). The IRS found that this would constitute, in effect, a reversion of assets to the employer because the employer would otherwise have to use its general corporate accounts to satisfy its liability. In this case, the transfer of reserves to the Southern Funds is not to satisfy any contractual liability owed to the Southern Employers by the Greater Funds.

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6 Because the transfer of reserves is not a return of contributions to the Southern Employers, there is no violation of ERISA's provisions restricting the transfer of assets to the benefit of contributing employers. 29 U.S.C. § 1103(c)(1). Similarly, because the Southern Employers have made no contention that they are entitled to a return of contributions, Petitioners' argument that ERISA has specific rules regarding the return of contributions is irrelevant.

Because the decision of the Second Circuit does not authorize the return of contributions to any employer, it does not conflict with the Ninth Circuit's decision in *Award Service, Inc. v. Northern Cal. Retail Clerks Union and Food Employers Joint Pension Trust Fund*, 763 F.2d 1066 (9th Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986). In that case, the Ninth Circuit held that an employer did not have a private right of action under LMRA section 302(c)(5) for a return of contributions made to a pension fund by mistake. 763 F.2d at 1071.- The Southern Employers do not seek a return of any contribution made by them to a trust fund on behalf of their employees. The Second Circuit's decision does not create a private right of action for the return of employer contributions. The Ninth Circuit decision in *Award Service* does not create a "clear conflict" between the circuit courts because it addresses an issue not present in the instant case.

Similarly, the Second Circuit's decision does not conflict with the Seventh Circuit's decision in *Stinson*, 869 F.2d 1014 (7th Cir. 1989). In *Stinson*, the Seventh Circuit discussed the Second Circuit's decision in *Local 50*, and distinguished it on its facts, finding that it did not "compel a different result." 869 F.2d at 1021. The Seventh Circuit instead followed the Second Circuit's reasoning in *O'Hare*, 740 F.2d 160 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985). The *Stinson* court noted that in *O'Hare*, the Second Circuit rejected a claim for a transfer of funds from a multiemployer pension plan when only a few employees left the pension plan, "distinguishing *Local 50* on several grounds." Id. The Seventh Circuit did not find its decision in *Stinson* in conflict with the Second Circuit.

The Second Circuit's decision also is consistent, rather than conflicting, with a Ninth Circuit case cited by petitioners. In *British Motor Car Distrib. v. San Francisco Automotive Indus. Welfare Fund*, 882 F.2d 371, 378 (9th Cir. 1989), the Ninth Circuit found that a transfer of assets from a multiemployer plan to three successor trust funds after the plan ceased operations and its participants transferred was consistent with section 302(c)(5). The Ninth Circuit rejected an argument that the transferred assets

had to be restricted to the particular employees transferred. The Second Circuit's holding does not require multiemployer funds to tie the benefits of employee-participants to their employer's individual contributions. Pet. App. at 10a. Nor does it prohibit a multiemployer plan from pooling resources for the benefit of all participants. In fact, the Second Circuit ordered a reallocation of a portion of reserves to the Southern Funds without requiring that those funds be used only for employees who transferred from the Greater Funds to the Southern Funds. Pet. App. at 11a.

CONCLUSION

Based on the foregoing reasons, this Court should deny the petition for writ of *certiorari* to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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